INDEX

CASES CITED

IN THE

Supreme Court of the United States

OCTOBER TERM 1942

No. 881

In the Matter

of the

Petition of KABUSHIKI KAISHA KAWASAKI ZOSENJO, Owner, and KAWASAKI KISEN KABUSHIKI KAISHA, Bareboat Charterer of the Steamship "VENICE MARU", for Exoneration from and Limitation of Liability.

CONSUMERS IMPORT CO., INC., et al.,
Cargo Claimants-Petitioners,

KABUSHIKI KAISHA KAWASAKI ZOSENJO and KAWASAKI KISEN KABUSHIKI KAISHA,
Respondents.

RESPONDENTS' ANSWER TO PETITIONERS' REPLY BRIEF

The question of what were "the exact words employed by Mr. Justice Miller" in the opinion of this Court in *Walker* v. *Transportation Co.*, (No. 110—December Term 1865) is put in issue by the last paragraph on page 2 of petitioners' reply brief. That case is reported in 3 Wallace 150, and in 18 L. ed. 172. I had mistakenly assumed that there was no difference between the two reports and, after comparing petitioners' quotation from the opinion at page 15 of the petition with the report as contained in 18 L. ed.

172, asserted that they had misquoted the language (respondents' brief p. 11).

Upon receipt of petitioners' reply brief, I compared the opinion as reported in 3 Wallace 150 with the opinion as reported in 18 L. ed. 172, and found a substantial difference between them in the language of the paragraph quoted. Petitioners' quotation of one of the two sentences contained in that paragraph is correct as reported at 3 Wallace 150, 153 but incorrect as reported at 18 L. ed. 172, 174. My quotation of all three of the sentences of that paragraph is correct as reported at 18 L. ed. 172, 174 but incorrect as reported at 3 Wallace 150, 153 in respect to two sentences. My statement that petitioners misquoted the language of the opinion *as reported at 3 Wallace 150, 153*,[1] was, therefore, an error.

In order to remove all doubt as to what this Court actually said in the paragraph under discussion, I requested the Clerk to furnish me with a certified copy of the original opinion in *Walker* v. *Transportation Co.*, supra, from the archives of the Court and he has done so under date of April 27, 1943. This certified copy of the opinion is printed as an appendix hereto with the paragraph under discussion emphasized for convenient reference. This certified copy clearly shows that this paragraph was incorrectly reported at 3 Wallace 150, 153 and correctly reported at 18 L. ed. 172, 174; the emphasized paragraph is identical with the quotation in respondents' brief (p. 11) except that the word "first" is spelled out in the certified copy and abbreviated ("1st") in the brief. The conclusion drawn in respondents' brief (p. 11) from that quotation is inescapable.

Petitioners' statement (reply brief p. 3) concerning the *Getsuyo Maru*, which sailed from Yokohama on June 28, is misleading. As the Circuit Court of Appeals below said:

> "Nor could Okubo have done anything when he learned that the cargo of the 'Getsuyo Maru' had

[1] Emphasis throughout brief and appendix is mine unless otherwise noted.

heated. That vessel reached New York on July 29, the day that the 'Venice Maru' reached Los Angeles. There is no evidence when Okubo first learned that the meal had heated, except of course that it could not have been before the 29th. It is most unlikely that he heard of it before the 30th, the day when the 'Venice Maru' left Los Angeles. We must not clutch at such straws to find liability, or construe the Fire Statute grudgingly" (R. 2046).

That Okubo did not supervise Fegen, but left the stowage to him as an expert, is shown by the following quotation from the same opinion:

"The charterer's business was in charge of one, Okubo, who lived in Kobe, and who alone had the active direction of its affairs, although it had a president, who was inactive. Okubo knew of the previous heating of all the cargoes mentioned except those leaving in June; *he did not tell Fegen of these when he retained him, and he paid no further attention to the stowage*" (R. 2041-43).

Respectfully submitted,

GEORGE C. SPRAGUE,
Counsel for Respondents.

May 3, 1943.

APPENDIX

SUPREME COURT OF THE UNITED STATES

No. 110—December Term, 1865

Charles H. Walker et al., Appellants, vs. The Western Transportation Co.	Appeal from the Circuit Court of the United States for the Northern District of Illinois.

Mr. Justice Miller delivered the opinion of the Court.

Plaintiffs filed their libel in personum [sic], for the value of wheat shipped on board the defendant's ship Falcon, at Chicago, to be delivered at Buffalo.

Defendant admits the receipt of the wheat on board the vessel, and the failure to deliver, and sets up three defences.

1. That the wheat was destroyed by fire, which was not caused by the design or neglect of defendant. This article is framed to meet the act of March 3, 1851.

2. That the wheat was received on board, with reference to the terms of the bills of lading usually given by respondent, which contained an exception of the dangers of navigation fire, and collison [sic]. No proof was offered under this article.

3. That it was received with reference to the forms of bills of lading in general use on the lakes, which contained an exception of perils of navigation, perils of the sea, and other equivalent words; and that by general and well known usage and custom, these words included loss by fire.

In setting forth the custom, in the 11th article of the answer, it is stated that the custom is to construe those words as an exemption from liability for loss by fire, unless it occurs by the negligence or misconduct of the owner of the vessel, his agents or servants. It then avers that the fire did not occur through the negligence or misconduct of respondent, or its servants or agents.

1. Is the owner of a vessel used in the trade on the lakes liable, independent of contract, for a loss by fire, which occurs without any design or neglect of the owner; although it may be traced to negligence of some of the officers or agents having charge of the vessel?

The answer to this question depends upon the construction to be given to the act of March 3, 1851, (9 U. S. Statutes 635,) entitled an act to limit the liability of ship owners, and for other purposes. That the owners of vessels were liable at common law in the case stated, had been decided by this court in the case of the New Jersey Steam Navigation Co. vs. The Merchants' Bank, 6 Howard, 344. That decision led to the enactment of the statute of 1851. This statute has been the subject of consideration in this court before, in the case of Moore and others vs. The American Transportation Co., 24 Howard, 1. The policy of the act, its relation to the act of 53 George III, and other British statutes, are there discussed; and it is decided—that being the principal question before the court—that the act embraces vessels engaged in commerce on the great northern lakes as well as on the ocean. It is quite evident that the statute intended to modify the ship owner's common law liability for every thing but the act of God and the king's enemies. We think that it goes so far as to relieve the ship owner from liability for loss by fire, to which he has not contributed either by his own design or neglect.

The language of the first section is, that no owner or owners, of any ship or vessel, shall be liable to answer for any loss or damage which may happen by reason or means

of fire on board said ship or vessel, "unless such fire is caused by the design or neglect of such owner or owners." The owners are here released from liability for loss by fire in all cases not coming within the exception. The exception is of cases where the fire can be charged to the owners' design, or the owners' neglect.

When we consider that the object of the act is to limit the liability of *owners*[2] of vessels, and that the exception is not in terms of negligence generally, but only of negligence of the owners, it would be a strong construction of the act, in derogation of its general purpose, to hold that this exception extends to the officers and crews of the vessels as representing the owners.

If, however, there could be any doubt upon the construction of this section standing alone, it is removed by a consideration of the sixth section of the same act. This enacts that nothing in the preceding sections shall be construed to take away, or affect the remedy to which any party may be entitled against the master, officers, or mariners of such vessel, for negligence, fraud, or other malversation. This implies that it was the purpose of the preceding sections to release the owner from some liability for conduct of the master and other agents of the owner, for which these parties were themselves liable, and were to remain so; and that is stated to be their negligence and fraud.

We are therefore, of opinion that in reference to fires occurring on that class of vessels to which the statute applies, the owner is not liable for the misconduct of the officers and mariners of the vessel in which he does not participate personally.

2. But there is a proviso to the first section of the act of 1851, which says, "that nothing in this act contained shall prevent the parties from making such contract as they please, extending or limiting the liability of such owner." It is claimed by libellants, that the answer of the

[2] Emphasis appears in opinion.

defendants sets out a contract which makes the owners liable in case of loss by fire, from the negligence of their officers and agents; and that by the amendment to the libel, this contract is admitted; and that the only question left in the case is the existence of such negligence. On this question, testimony was taken on both sides.

The respondent undoubtedly does set out, in the 11th article of his answer, that the wheat was received on board with the understanding that the usual bill of lading, common in that trade, should be given and accepted as the contract between the parties, and avers that such bill of lading contained a clause exempting the ship owner from liability for loss by "perils of navigation, perils of the sea, and other equivalent words;" and that by usage and custom, those words included loss by fire, unless said fire had been caused by the negligence or misconduct of the owner or his servants or agents.

This article was excepted to, as well as the other two defences we have mentioned, by libellants, in the district court in 1856, when the case was tried there; but no ruling seems to have been had on the exceptions. When the case came to the circuit court, in 1860, after the case of Moore vs. The Transportation Co. had decided that the act of 1851 was applicable to the lake trade, the libellants, perceiving the advantage to be gained by such a special contract, amended their libel and admitted it. No proof was offered of the contract or of the custom; and it may be doubted if the defendant intended to state, as an affirmative proposition, that on such bills of lading as those described, usage held the owners responsible for the negligence of their officers in cases of fire. But the custom is so stated, and the libellants admit the contract, and the construction given to it by custom.

But it is obvious that there is nothing in the *language*[3] of such bills of lading concerning "perils of navigation and perils of the sea," which makes the owner liable for the

[3] Emphasis appears in opinion.

negligence of his servants in case of loss by fire. Can usage add to words which do not express it, a liability from which the act of Congress declares the ship owner to be free? It was the common law, or immemorial usage which made him liable before the statute. That relieved him from the force of that usage or law. It cannot be that the liability can be revived by merely attaching such usage to words in a contract, which have no such meaning of themselves. The contract mentioned in the proviso, which can take a case out of the statute, is one made by the parties, not by custom. In other words, an express contract.

We do not believe, then, that the special contract set up by respondent, founded on usage, although admitted by the libellants, is founded on a custom which the law will support, and therefore the case must be governed by the act of 1851.

The construction which we have already given to that act, requires that the judgment of the circuit court, dismissing the libel, shall be affirmed, with costs.

A true copy:

Test:

CHARLES ELMORE CROPLEY, Clerk,
Supreme Court of the United States.
By HAROLD B. WILLEY
Deputy.

[Seal of the Supreme Court
of the United States]

SUPREME COURT OF THE UNITED STATES.

No. 32.—October Term, 1943.

Consumers Import Co., Inc., et al., Petitioners, *vs.* Kabushiki Kaisha Kawasaki Zosenjo, et al.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[November 8, 1943]

Mr. Justice Jackson delivered the opinion of the Court.

Petitioners, Consumers Import Company, and others hold bills of lading covering several hundred shipments of merchandise. The shipments were damaged or destroyed by fire or by the means used to extinguish fire on board the Japanese ship *Venice Maru* on August 6, 1934, on voyage from Japan to Atlantic ports of the United States. Respondent Kabushiki Kaisha Kawasaki Zosenjo owned the *Venice Maru* and let her to the other respondent, Kawasaki Kisen Kabushiki Kaisha, under a bareboat form of charter. The latter was operating her as a common carrier.

Damage to the cargo is conceded from causes which are settled by the findings below, which we decline to review.[1] Upwards of 660 tons of sardine meal in bags was stowed in a substantially solid mass in the hold. In view of its susceptibility to heating and combustion it had inadequate ventilation. As the ship neared the Panama Canal, fire broke out, resulting in damage to cargo and ship. The cause of the fire is found to be negligent stowage of the fish meal, which made the vessel unseaworthy. The negligence was that of a person employed to supervise loading to whom responsibility was properly delegated and who was qualified by experience to perform the work. No negligence or design of the owner or charterer is found.

The cargo claimants filed libels *in rem* against the ship and *in personam* against the charterer for breach of contracts of

[1] The facts are considered at length in the opinion of the Court of Appeals, 133 F. 2d 781.

carriage. The owner joined the charterer in a proceeding in admiralty to decree exemption from or limitation of liability. Stipulation and security were substituted for the ship in the custody of the court.[2] The District Court applied the so-called "Fire Statute" to exonerate the owner entirely and the charterer and the ship in all except matters not material to the issue here. The Circuit Court of Appeals affirmed, taking a view of the statute in conflict with that of the Fifth Circuit in *The Etna Maru*, 33 F. 2d 232. To resolve the conflict we granted certiorari expressly limited to the question, "Does the Fire Statute extinguish maritime liens for cargo damage, or is its operation confined to *in personam* liability only?"[3]

The Fire Statute reads: "No owner of any vessel shall be liable to answer for or make good to any person any loss or damage, which may happen to any merchandise whatsoever, which shall be shipped, taken in, or put on board any such vessel, by reason or by means of any fire happening to or on board the vessel, unless such fire is caused by the design or neglect of such owner."[4] The statute also provides that a charterer such as we have here stands in the position of the owner for purposes of limitation or exemption of liability.[5]

Since "neglect of the owner" means his personal negligence, or in case of a corporate owner, negligence of its managing officers and agents as distinguished from that of the master or subordinates,[6] the findings below take the case out of the only exception provided by statute.

Apart from this inapplicable exception the immunity granted appears on its face complete. But claimants contend that because their contracts of affreightment were signed "for master" they became under maritime law ship's contracts, independently

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[2] Admiralty Rule 51.

The Alien Property Custodian on July 30, 1942, vested in himself all property in the United States of respondent Kawasaki Kisen Kabushiki Kaisha. Vesting Orders 77 and 80, 7 Federal Register 7048, 7049. On March 15, 1943, he vested in himself all property of Tokyo Marine & Fire Insurance Co. Ltd., a Japanese corporation which advanced cash collateral to the surety who became such in the *ad interim* stipulation. Vesting Order 1084, 8 Federal Register 3647.

[3] — U. S. —.

[4] Act of March 3, 1851, § 1, now 46 U. S. C. § 182, formerly R. S. § 4282.

[5] Act of March 3, 1851, § 5, now 46 U. S. C. § 186.

[6] Walker *v.* Transportation Co., 3 Wall. 150; Craig *v.* Continental Ins. Co., 141 U. S. 638, 647; Earle & Stoddart *v.* Ellerman's Wilson Line, 287 U. S. 420, 424.

of any owners' contracts, and that the ship itself stands bound to the cargo though the owner may be freed. It seems unnecessary to examine the validity of the claim that apart from the statute claimants under the circumstances would have a lien on the vessel, or to review the historical development of the fiction that the ship for some purposes is treated as a jural personality apart from that of its owner. If we assume that the circumstances are appropriate otherwise for such a lien as claimants assert, it only brings us to the question whether the Fire Statute cuts across it as well as other doctrines of liability and extinguishes claims against the vessel as well as against the owner.

The provision here in controversy is Section 1 of the Act of March 3, 1851. Despite its all but a century of existence, the contention here made has never been before this Court. Sections 3 and 4 of the same Act in other circumstances provided limitations of liability, and as to them a question was considered by this Court in *The City of Norwich*, 118 U. S. 468, 502 (1886), stated thus: "It is next contended that the act of Congress does not extend to the exoneration of the ship, but only exonerates the owners by a surrender of the ship and freight, and, therefore, that the plea of limited liability cannot be received in a proceeding *in rem*." The Court rejected the contention and held that when the owner satisfied the limited obligation fixed on him by statute, owner and vessel were both discharged. The Court said that "To say that an owner is not liable, but that his vessel is liable, seems to us like talking in riddles." The riddle after more than half a century repeated to us in different context does not appear to us to have improved with age.

In the meantime, with the exception of *The Etna Maru*, the lower federal courts have uniformly construed the statute as exonerating the ship as well as the owner.[7] We would be reluctant to overturn an interpretation supported by such consensus of opinion among courts of admiralty, even if its justification were more doubtful than this appears.[8]

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[7] Dill *v.* The Bertram, Fed. Cas. 3910; Keene *v.* The Whistler, Fed. Cas. 7645; The Rapid Transit, 52 Fed. 320; The Salvore, 60 F. 2d 683; The Older, 65 F. 2d 359; The President Wilson, 5 F. Supp. 684; see Earle & Stoddart *v.* Ellerman's Wilson Line, 287 U. S. 420, 427, n. 3; The Buckeye State, 39 F. Supp. 344, 346-47.

[8] See United States *v.* Ryan, 284 U. S. 167, 174; Missouri *v.* Ross, 299 U. S. 72, 75.

Petitioners say, however, that such of these decisions as are not distinguishable were "ill-considered." We think that the better reason as well as the weight of authority refutes petitioners. To sustain their contention would deny effect to the Fire Statute as an immunity and convert it into a limitation of liability to the value of the ship. This is what Congress did in other sections of the same Act[9] and elsewhere,[10] which suggests that it used different language here because it had a different purpose to accomplish. Congress has said that the owner shall not "answer for" this loss in question. Claimant says this means in effect that he shall answer only with his ship. But the owner would never answer for a loss except with his property, since execution against the body was not at any time in legislative contemplation. There could be no practical exoneration of the owner that did not at the same time exempt his property. If the owner by statute is told that he need not "make good" to the shipper, how may we say that he shall give up his ship for that very purpose? It seems to us that Congress has, with the exception stated in the Act, extinguished fire claims as an incident of contracts of carriage, and that no fiction as to separate personality of the ship may revive them. There may, of course, be a waiver of the benefits of the Fire Statute, but none is present in this case.

Claimants urge that the statute as construed goes beyond any other exemption from liability for negligence allowed to a common carrier, and that it should therefore be curtailed by strict construction. We think, however, that claimants' contention would result in a frustration of the purpose of the Act.

At common law the shipowner was liable as an insurer for fire damage to cargo.[11] We may be sure that this legal policy of annexing an insurer's liability to the contract of carriage loaded the transportation rates of prudent carriers to compensate the risk. Long before Congress did so, England had separated the insurance liability from the carrier's duty.[12] To

[9] §§ 2, 3, Act of March 3, 1851.

[10] Harter Act of February 13, 1893, 46 U. S. C. §§ 190-96.

[11] New Jersey Steam Navigation Co. v. Merchants' Bank, 6 How. 344, 381. The Act of March 3, 1851, followed soon after and probably was enacted in consequence of this decision. See The Great Western, 118 U. S. 520, 533.

[12] This Court has heretofore pointed out that the Act of March 3, 1851 was patterned on English statutes, including Act of 7 George II, c. 15, passed in

enable our merchant marine to compete, Congress enacted this statute.[13] It was a sharp departure from the concepts that had usually governed the common carrier relation, but it is not to be judged as if applied to land carriage, where shipments are relatively multitudinous and small and where it might well work injustice and hardship. The change on sea transport seems less drastic in economic effects than in terms of doctrine. It enabled the carrier to compete by offering a carriage rate that paid for carriage only, without loading it for fire liability. The shipper was free to carry his own fire risk, but if he did not care to do so it was well known that those who made a business of risk-taking would issue him a separate contract of fire insurance. Congress had simply severed the insurance features from the carriage features of sea transport and left the shipper to buy each separately. While it does not often come to the surface of the record in admiralty proceedings, we are not unaware that in commercial practice the shipper who buys carriage from the shipowner usually buys fire protection from an insurance company, thus obtaining in two contracts what once might have been embodied in one. The purpose of the statute to relieve carriage rates of the insurance burden would be largely defeated if we were to adopt an interpretation which would enable cargo claimants and their subrogees to shift to the ship the risk of which Congress relieved the owner. This would restore the insurance burden at least in large part to the cost of carriage and hamper the competitive opportunity it was purposed to foster by putting our law on an equal basis with that of England.

1734, and 26 George III, c. 86 (1786). See Norwich Co. *v.* Wright, 13 Wall. 104, 117 *et seq.*; The Main *v.* Williams, 152 U. S. 122, 124.

[13] Senator Hamlin reported the bill from the Committee on Commerce on January 25, 1851 and said, "This bill is predicated on what is now the English law, and it is deemed advisable by the Committee on Commerce that the American marine should stand at home and abroad as well as the English marine." 23 Cong'l Globe 332.

On February 26, 1851, speaking to the bill, Senator Hamlin said: "These are the provisions of the bill. It is true that the changes are most radical from the common law upon the subject; but they are rendered necessary first, from the fact that the English common law system really never had an application to this country, and, second, that the English Government has changed the law, which is a very strong and established reason why we should place our commercial marine upon an equal footing with hers. Why not give to those who navigate the ocean as many inducements to do so as England has done? Why not place them upon that great theatre where we are to have the great contest for the supremacy of the commerce of the world? That is what this bill seeks to do, and it asks no more." 23 Cong'l Globe 715.

Our conclusion is that any maritime liens for claimants' cargo damage are extinguished by the Fire Statute. In so far as the decision in *The Etna Maru* conflicts, it is disapproved, and the judgment of the court below is

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.